

HUMAN SERVICES BOARD

INTRODUCTION

The petitioner appeals the reassessment by the Department of Aging and Disabilities (DAIL) of the hours she receives for personal care attendant services pursuant to the Choices for Care Long-Term Medicaid Waiver. The decision below is based upon the evidence adduced at hearing, documentary evidence including materials for the 2005-2006 and 2006-2007 service years and the petitioner's underlying medical condition, briefs, and a further review through consideration of a Motion to Reconsider in addition to a remand of a discrete issue, the amount of Instrumental Activities of Daily Living. The Motion to Reconsider was denied and the resulting decision is attached hereto. The effect of the limited Remand is reflected in the Findings of Fact and the reasoning from the decision on the Motion to Reconsider and Remand is incorporated herein.

FINDINGS OF FACT

1. The petitioner is a forty-year-old woman who became a paraplegic due to a T12 vertebrae injury over ten years ago. Petitioner has no use of her legs, suffers from chronic and severe pain, has a neurogenic bladder, has rotator cuff injuries to both shoulders and carpal tunnel in both wrists, asthma, and depression. Petitioner is at risk of hospitalization due to urinary tract infections and skin breakdown. Petitioner resides in a mobile home with her boyfriend. Her boyfriend is one of her personal care attendants (PCA).

2. Petitioner has received waiver services from DAIL for several years. Petitioner received services from the Home and Community Based waiver until she was grandfathered into the Choices for Care (CFC) waiver program during December 2005.

3. In the CFC waiver program, a case manager submits an Independent Living Assessment (ILA) to DAIL. The ILA is comprised of several sections including an assessment of Activities of Daily Living (ADL), assessment of Instrumental Activities of Daily Living (IADL), and a medical assessment of the individual's health. The assessment is done in the individual's home by the case manager and a registered nurse

with the participation of the individual and, if appropriate, family members and personal care attendants. The case manager completes the sections for ADLs and IADLs, and the registered nurse completes the health section. The ADLs include dressing, bathing, personal hygiene, bed mobility, toilet use, adaptive devices, transferring, mobility, and eating. The CFC waiver includes meal preparation and medication management in the ADLs although these are IADLs. The CFC waiver caps the remaining IADLs at 330 minutes per week. Additional time is allowed for incontinence assistance. Level of care ranges from:

- a) 0 independent
- b) 1 supervision
- c) 2 limited assist
- d) 3 extensive assist
- e) 4 total dependence

Although each level of care has a maximum time allowance, an individual may request a variance. The CFC program recognizes that an individual may need time in excess of the maximum time limits and allows the individual to apply for a variance. Initially, variance requests were limited to ADLs. The program changed to allow variance requests for IADLs. Petitioner has historically received variances for both ADLs and IADLs.

4. Petitioner was reassessed for personal care services for the period of December 5, 2005 through December 4, 2006 (2005-2006 service year). Petitioner's reassessment was reviewed by B.S., a Long-Term Care Clinical Coordinator (LTCCC).

5. B.S. is one of twelve LTCCCs employed by DAIL to review the clinical criteria for the CFC program. B.S. is a registered nurse and nurse practitioner. B.S. has been a LTCCC for two years. B.S. reviewed the Independent Living Assessment (ILA), work service plan and variance requests for the 2005-2006 and 2006-2007 service years submitted by petitioner's case manager, M.S. of Champlain Valley Area Agency on Aging (CVAAA). M.S. has been a CVAAA case manager for five years and has received training from DAIL regarding the CFC program and how to complete the ILA. M.S. has completed 75 to 100 ILAs for the CFC program in addition to several hundred ILAs for other DAIL programs. M.S. first assessed petitioner during November 2004. The health assessment portion of the ILA was completed by M.M., of the Visiting Nurse Association (VNA). M.M. has been a registered nurse since 1970; she became the PCA supervisor at VNA during 2004. M.M. normally sees CFC recipients and their PCAs every sixty days but has seen petitioner more often.

6. For both service years, petitioner was rated as level three or needing extensive assistance with her ADLs except for transferring in which she was rated as level four or needing total assistance.

7. For the 2005-2006 service year, B.S. took the following action on petitioner's variance requests:

- a. Dressing. Approved an additional 10 minutes per day. Petitioner based her request on the effects of her torn rotator cuffs because she could no longer put on clothes that go over her head or behind her back without assistance.
- b. Personal Hygiene. Approved an additional 15 minutes per day. Petitioner based her request on daily changing of the dressing on her ankle pressure sore and applying lotion to her feet nightly to counteract severe dryness in addition to normal grooming.
- c. Shopping. Approved an additional 180 minutes per week or 60 minutes for three days. Petitioner originally requested an additional 60 minutes per day. Petitioner lives on Grand Isle and must travel out of county for groceries and for her pain medications.
- d. Transportation. Approved an additional 150 minutes per week. Petitioner originally requested an additional 180 minutes per week because one doctor is in Milton and the others are in Burlington. Petitioner was averaging two to three medical appointments per week. Petitioner's PCA transfers her in and out of the vehicle and into and out of the doctor's office.
- e. IADLS. Petitioner asked for 755 minutes of IADLS. Petitioner was granted 660 minutes although the corrected figures add up to 605 minutes including: phone use (0 minutes), money management (15),

household management (60), housekeeping and laundry (180), shopping (180), transportation (150), and adaptive equipment (20).

Based upon the ILA and variances, petitioner was granted the following time for personal care attendant services under the CFC program:

Dressing	210 minutes per week
Bathing	210
Personal Hygiene	210
Bed Mobility	70
Toilet Use	140
Adaptive Devices	0
Transferring	315
Mobility	140
Eating	35
Meal Prep	420
Medication Management	0
Additional Incontinence Assist	280
IADL	660

In all, petitioner was granted 2,690 minutes per week or 89.75 hours every two weeks. Petitioner had requested 2,785 minutes per week or 93 hours every two weeks.

8. Petitioner was reassessed for personal care services for the 2006-2007 service year.¹ M.M. completed the health assessment, and M.S. completed the ILA and variance requests.

¹After the 2005-2006 service year began, petitioner had bladder surgery and her CFC hours were increased during her post surgery recovery. Those increased hours are not an issue in this case.

9. Petitioner made the same variance requests for dressing, personal hygiene, shopping and transportation as she had the prior service year. In addition, petitioner requested new variances for bed mobility, toilet use, and mobility.

10. For the 2006-2007 service year, B.S. made the following variance decisions:

- a. Dressing. Denied the variance request. Petitioner made her request based on her circumstances and need being the same as for the 2005-2006 service year.
- b. Personal Hygiene. Granted five minutes daily of the fifteen minute request. Petitioner made her request based on her circumstances and need being the same as for the 2005-2006 service year.
- c. Bed Mobility. Approved the request for an additional ten minutes per day. Petitioner based her request on needing to be rolled every two hours to prevent bed sores and to promote circulation. Pain from petitioner's torn rotator cuff and carpal tunnel prevent her from assisting except on the occasional good day.
- d. Toilet Use. Denied with the notation that time is covered under incontinence assistance. Petitioner requested an additional twenty minutes per day based on the PCA cleaning her catheter and catheter site, irrigating her bladder, and making saline solution (insurance does not cover the cost of saline). Catheter care occurs 5 to 6 times per day.
- e. Mobility. Approved ten minutes per day out of a twenty minute request to cover twice weekly range of motion exercises by PCA and for assistance with wheeling petitioner. Petitioner requested

additional assistance because the pain from her rotator cuff injury and carpal tunnel keep her from wheeling herself except for short distances.

- f. Shopping. Granted same variance as previous year, 180 minutes per week.
- g. Transportation. Granted a variance of 160 minutes per week or an increase of ten minutes per week from the previous year's variance (150 minutes per week).

On the variance decision, B.S. listed all the IADLs and reduced several IADLS including money management by five minutes per week, housekeeping and laundry by sixty minutes per week, and adaptive equipment by five minutes per week. The total IADLS approved by B.S. added up to 545 minutes and included: phone use (0 minutes), money management (10), household maintenance (60), housekeeping and laundry (120), shopping (180), transportation (160), and adaptive equipment (15).

Based on the variance decisions and the ILA, petitioner was granted the following CFC services:

Dressing	140 minutes per week
Bathing	210
Personal Hygiene	140
Bed Mobility	140
Toilet Use	140
Adaptive Devices	0
Transferring	315
Mobility	210
Eating	35
Meal Prep	420
Medication Management	0

Additional Incontinence Assist	280
IADL	545

Petitioner was granted 2,575 minutes per week or 86 hours every two weeks. Petitioner had requested 3,135 minutes per week or 104.5 hours every two weeks.

11. The service plan for the 2006-2007 service year included the following reductions from the 2005-2006 service year:

Dressing	70 minutes/week
Personal Hygiene	70 minutes/week
IADLs	115 minutes/week

In addition, petitioner was denied new variance requests including:

Toilet use	additional 140 minutes/week
Mobility	additional 70 minute/week

12. M.S., CVAA case manager, testified regarding her role in meeting with petitioner and completing the ILA for the 2006-2007 service year reassessment. M.S. reviewed the reassessment from the 2005-2006 service year. M.S. used the variance requests from the 2005-2006 service year for dressing, hygiene, shopping, and transportation. According to M.S., petitioner's needs have not changed. In particular, the petitioner needs assistance dressing because she is unable to lift her arms to put on clothing over her head due to her torn rotator cuffs. M.S. indicated that petitioner

still needs additional time for personal hygiene to address skin breakdown on her ankle and time for lotions to counteract severe skin dryness. M.S. explained that additional time needed to be built into shopping because petitioner lives on Grand Isle. There is no major grocery store on Grand Isle. Petitioner shops in Burlington rather than Milton because she is low income and can use double coupons at the Burlington Price Chopper. M.S. said the shopping trip is thirty minutes one way on a good day. M.S. explained that petitioner needs additional time for transportation as she needs to be transferred into and out of doctor's offices for medical appointments. Although there is a Medicaid transportation service for Grand Isle, they do not do the transfers into and out of medical offices. M.S. was asked about the additional time requested in the ILA. M.S. explained that petitioner uses her arms for wheeling and other needs, but has increasing difficulty uses her arms because of her carpel tunnel and torn rotator cuffs.

13. M.M., PCA supervisor through the VNA, testified on petitioner's behalf. M.M. supervises the PCAS working with petitioner. M.M. sets up the petitioner's care plan based upon the hours approved by DAIL for CFC services. As part of her duties, she meets with the individual, sees what the home

set-up is, and assesses the PCAs. M.M. has done the health assessments on petitioner's ILA since 2004 or 2005. M.M. testified that she considers how the individual's health applies to the rest of her care including the individual's skill levels. M.M. testified that petitioner has numerous challenges stemming from her spinal cord injury, torn rotator cuffs, carpal tunnel, urinary diversion surgery, and depression. M.M. has witnessed a change in petitioner's ability to mobilize, to dress, and to use her arms. M.M. stated that petitioner's functional abilities have decreased due to less upper body strength. As an example, M.M. testified that petitioner could pour a cup of coffee in 2004 but now struggles to do so. M.M. explained that petitioner had urinary diversion surgery during the past year to improve urinary functioning. Petitioner now has a catheter. As a result, petitioner's toileting care includes catheter care which is done in bed and can be challenging to do. According to M.M., petitioner is still at risk for recurrent urinary tract infections. M.M. testified that petitioner is at risk for skin break down and there is a need to change her position because of decreased sensation.

14. B.S. testified. B.S. based her decisions upon a review of the ILA and other materials submitted by M.S. and

M.M. At the time B.S. made her determinations for both the 2005-2006 and 2006-2007 service years, B.S. had not met petitioner. For 2005-2006, B.S. granted petitioner's variance request for dressing. For 2006-2007, B.S. did not grant an identical request noting that in her professional judgment, the time allowed in the ILA should be sufficient. For 2005-2006, B.S. granted petitioner's variance request for personal hygiene. For 2006-2007, B.S. only granted five minutes of petitioner's identical 15 minute request stating that lotion use for petitioner's feet should be part of normal hygiene. B.S. did testify that petitioner's condition was the same for both service years. B.S. did note that the 2005-2006 variance requests were pre-surgery and the 2006-2007 variance requests were post-surgery. However, there was no testimony why petitioner's intervening bladder surgery would lead to a different result in the assessment of petitioner's variance requests for dressing and personal hygiene. In terms of the new request for a variance for toilet use, B.S. testified that she believed the request was duplicative because the care is covered under incontinence assistance. B.S. testified that she made a math error on the IADLs in the 2005-2006 service year by double counting time for shopping and transportation. B.S. did not give a figure

of what the IADLs should be during her testimony. B.S. later clarified that the petitioner's IADLs included 60 minutes each for transportation and shopping so that the variance would include an additional 120 minutes for transportation and 100 minutes for shopping. However, by adding the breakdown of IADLs in her notes on the variance requests for 2005-2006, the amount totals 605 minutes, not the 660 minutes granted. A discrepancy remains between the documentary evidence submitted at hearing and the testimony of B.S. The documentary evidence is contemporaneous with the reassessments and provides more accurate evidence.

15. B.S. visited with petitioner on May 30, 2007, the day before the fair hearing. During that visit, B.S. did not have the petitioner demonstrate transferring or other ADLs. B.S. asked petitioner if she agreed that she needed extensive assistance and the petitioner agreed to the statement. B.S. testified that petitioner could heat up leftovers in the microwave so that the time allowed for meal preparation should be lower. B.S. testified that petitioner questioned her why her hours were not the same when her condition was the same.

16. Petitioner testified by telephone. Petitioner testified that B.S. visited her on May 30, 2007. According

to petitioner, B.S. asked her if she can use the microwave. Petitioner said she explained that if someone else prepared the food and then set it up, she could use the microwave. Petitioner described her care. She is lifted into the shower by her PCA. She needs help washing her lower legs, back, bottom and then being lifted out and toweled off. In terms of skin care, the PCA uses lotion and uses a pumice stone on dry skin and on areas that have turned black to restore normal coloration. Petitioner is concerned about skin breakdown and sores. Petitioner is turned approximately every two hours. If she is not turned, she can develop sores. Petitioner testified that she is in constant pain. On some days, she does not want to get out of bed. She cannot be pushed quickly in her chair because it hurts. Petitioner said she is trying to set up an appointment with the pain clinic. Petitioner said she cannot combine trips because of the pain so that she needs transportation to be covered. One car trip includes four transfers. Petitioner testified that her medications include a controlled substance and a narcotic. The pharmacies on Grand Isle do not carry these medications. The closest pharmacy carrying her pain medications is in Milton, approximately thirty minutes one way. Petitioner listed the physicians she sees including her

primary care doctor, urologist, gynecologist, surgeon for shoulders, and surgeon for wrists. Petitioner said she is not able to see her doctors as often as they want to see her. She has been told to see a therapist.

17. Petitioner submitted an affidavit from Dr. M. R., her treating physician at Milton Family Practice. Petitioner has been a patient at Milton Family Services for many years; Dr. M.R. took over petitioner's care one year ago. Dr. M. R. noted that transportation has been an issue for petitioner who has been able to come to appointments every three months rather than monthly. According to Dr. M.R., petitioner is at risk of hospitalization due to urinary tract infections and skin breakdown. Dr. M. R. stated, in part:

The nature of [petitioner's] medical condition is to be steadily progressive. The paralysis puts strain on the upper body. That is why her pain is getting worse and she has injuries to her shoulders and wrists. She uses her arms a lot to make transfers and to prevent, or properly care for, pressure sores.

In the spring of 2006, [petitioner] underwent bladder surgery known as a supra-pubic diversion which enables her to self-catheterize from the abdomen to prevent repeated wounds and trauma below. The surgery does not alleviate her risk for UTIs since using catheters always introduces bacteria into the bladder. For people like [petitioner] there is always a risk that UTIs which can become life threatening. That is why it is important that she should have good catheter care and that it is done cleanly and appropriately.

ORDER

DAIL's decision is affirmed in part and reversed in part as more fully set out below.

REASONS

Congress established the Medicaid program as a cooperative federal and state program:

to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care. . . .

42 U.S.C. § 1396.

State participation is voluntary. However, once a state elects to participate in the Medicaid program, the state must submit a state plan and comply with certain Congressional requirements. 42 U.S.C § 1396a, Harris v. McRae, 448 U.S. 297, 301 (1980).

To provide the States latitude in meeting the medical needs of their residents, Congress permits a State to apply for a Medicaid Waiver in which the State receives permission to waive certain requirements of the Medicaid program. One of the areas Congress has targeted for Medicaid Waivers is

home health care and services to prevent

institutionalization; 42 U.S.C. § 1396n(c)(1) provides:

The Secretary may by waiver provide that a State Plan approved under this subchapter may include as **"medical assistance"** under such plan payment for part or all of the cost of home and community-based services. . .which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination **that but for the provision of such services the individuals would require the level of care provided in a hospital or nursing facility. . .**(emphasis added).

See 42 C.F.R. § 441.300.

DAIL has opted to develop waiver programs to help individuals such as petitioner remain in their homes and communities rather than being institutionalized. In doing so, DAIL has submitted specific waiver requests to the Centers for Medicare and Medicaid Services for approval. These programs serve two purposes—(1) allowing participants who need nursing home care the ability to stay in the comfort of their homes and (2) saving the state money because the cost of home care is less than nursing home care.

Before continuing with the specifics of petitioner's case, there are several preliminary matters to address.

First, DAIL contends that their Medicaid waiver programs are not medical insurance programs since the services they pay for are attendant care services. Congress defines waiver

programs that prevent institutionalization as "medical assistance". 42 U.S.C. § 1396n(c)(1). By opting to request a Medicaid waiver, DAIL has agreed to provide safeguards "to protect the health and welfare of individuals provided services under the waiver". 42 U.S.C. § 1396n(c)(2)(A).

Congress has defined services at 42 U.S.C. § 1396(d)(4) as:

A waiver under this subsection may, consistent with paragraph (2), provide medical assistance to individuals for case management services, homemaker/home health aide services and **personal care services**, adult day health services, respite care, and other medical and social services that can contribute to the health and well-being of individuals and their ability to reside in a community-based care setting. (emphasis added)

Pursuant to 3 V.S.A. § 3091(d), the Board has the authority to determine whether agency actions including agency actions conflict with applicable federal or state law. DAIL's interpretation of the nature of Medicaid waiver programs including the CFC program conflicts with Congressional intent. Medicaid, including Medicaid waiver programs are medical insurance programs.

Second, DAIL has repeatedly objected to the entry of evidence from participant's doctors in CFC cases. They mainly base their argument on their interpretation that the CFC program is not a medical program. As stated above, that interpretation is faulty. Even *assuming arguendo* that the

CFC program is not a medical program, DAIL cannot ask for a blanket prohibition against evidence from doctors. "Relevant evidence" is defined to mean:

. . .evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Vermont Rules of Evidence 401

The general policy of the CFC program is "to ensure quality and protect the health and welfare of the individuals receiving services". CFC Regulations II.A.p.1. A participant's doctor may have information describing the participant's physical capabilities, needs, and potential impacts if the participant does not receive sufficient services. Medical evidence may be relevant; the weight of that evidence is for the trier of fact. DAIL's continuing objection to Dr. M. R.'s affidavit as irrelevant is overruled.

Here, petitioner has been assessed by DAIL as meeting the clinical criteria that she needs nursing home level care. DAIL first made this assessment under the Home and Community Based Services waiver and continued this assessment under the CFC program. CFC became operational on October 1, 2005, and

petitioner was grandfathered into the CFC program with her 2005-2006 service year plan.

Because petitioner is grandfathered into the CFC waiver, petitioner cannot be considered a new applicant whose eligibility needs to be determined. Petitioner is an eligible participant whose service needs are annually reviewed through the reassessment process. CFC 1115 Long-Term Care Regulations, Section VII(B).

Petitioner's case manager submitted the reassessment for the 2006-2007 service year requesting 104.5 service hours every two weeks. Petitioner's request incorporated several variance requests. Four variance requests were to maintain petitioner's prior service levels. Three variance requests were new. Although the overall hours are similar, there are significant reductions to two ADLs, dressing and personal hygiene, and to the overall level of the IADLs. Part of DAIL's actions led to a reduction in certain existing services.

Petitioner requested a fair hearing but did not do so in time for continuing benefits.

DAIL has recognized the right of aggrieved individuals to contest a denial, reduction, or termination of CFC services. In fact, DAIL incorporated the right of

individuals to seek redress pursuant to the Human Services Board statute and rules in their waiver and subsequent regulations. CFC 1115 Long-Term Care Regulations IX.

Petitioner's case presents complicated issues because DAIL's reassessment of petitioner's CFC service needs includes a reduction to two ADLs (dressing and personal hygiene) and the overall IADLs and includes a decision not to grant new variance requests (toilet use and additional times to mobility). In addition, DAIL's reassessment did not grant petitioner's renewed request for additional time for shopping and transportation.

The parties differ on the nature of petitioner's legal interest in the CFC benefits and who has the burden of proof. The petitioner argues that DAIL has the burden of proving the basis for reducing past hours for dressing, personal hygiene, and IADLs. Further, petitioner argues that she has shown the need for the variance requests for toilet use and mobility as well as increases for shopping and transportation. DAIL argues that petitioner has the burden of proving they were wrong in reducing petitioner's service hours and denying variance requests.

The burden of proof flows from the protection of petitioner's property interest in her service hours, and the due process rights which flow from that property interest. Goldberg v. Kelly, 397 U.S. 254 (1970). The Supreme Court in the Goldberg case recognized that welfare recipients had a property interest in their welfare benefits and that due process attached when the state proposed terminating or reducing those benefits.

Courts have recognized the property rights of Medicaid recipients. See Cantazano v. Wing, 103 F.3d 223 (2nd Cir. 1996) (right to fair hearing whenever services are denied); Granato v. Bane, 74 F.3d 406 (2nd Cir. 1996) (termination of HCBS waiver services upon hospitalization is agency action triggering due process requirements); 42 C.F.R. § 431.201. These property rights extend to Medicaid waiver recipients. Boulet v. Cellucci, 107 F.Supp.2d 61 (D. Mass. 2000); Cramer v. Chiles, 33 F.Supp.2d 1342 (S.D. Fla. 1999), Martinez v. Ibarra, 759 F.Supp. 664 (D. Colo. 1991).

Weaver v. Colorado Dept. of Social Services, 791 P.2d 1230 (1990) is instructive. Colorado used a point system to determine eligibility for their HCBS waiver program. Weaver received services for two years. Although there was no change in Weaver's medical and physical condition, he was

denied services. The Court noted that the different scores may reflect the different attitudes of the evaluators.

Further, the court stated at page 1235:

. . .if an individual has once been determined to be eligible for social service benefits, due process prevents a termination of these benefits absent a demonstration of a change in circumstances, or other good cause.

Moreover, the Board rules recognize that state agencies bear the burden of proof when there is a reduction or termination of assistance or services. Fair Hearing Rule No. 11 states:

The burden of proving facts alleged as the basis for agency decisions to terminate or reduce an assistance grant, or to revoke or fail to renew a license, shall be on the agency, unless otherwise provided by statute.

Our analysis needs to differentiate between the reduction of services, specifically the dressing and personal hygiene variances, and the decision to not grant new variance requests, specifically toilet care and mobility as well as the requests for increased time for shopping and transportation. Moreover, we need to be mindful that the petitioner's service hours are warranted by her medical needs. Husrefovich v. Dept. of Aging and Independent Living, 2006 VT 17 (2006).

In terms of dressing and personal hygiene, the question remains whether DAIL has met its burden of proof that the reduction of these services reflects the appropriate level of CFC waiver services hours based on petitioner's functional and health needs. Petitioner was already eligible for CFC waiver services; the purpose of the reassessment was to compute the appropriate level of services. Petitioner's situation is similar to other individuals facing redetermination or reassessment of their benefits from other programs administered by the Agency of Human Services (DAIL's parent agency) such as the amount of RUFA or Food Stamps, the amount of a Medicaid spend-down, etc. Any time the agency proposes adverse action based upon such a redetermination or reassessment, the agency bears the burden of proof in a fair hearing.

Accordingly, DAIL has the burden of proof regarding those areas in which they have reduced services. Before there can be a finding that petitioner does not need the same service hours as in the past, DAIL needs to show a factual basis supporting a reduction of service hours.

DAIL is charged with delivering long-term care services that "protect the health and welfare of the individuals receiving services". C.F.C. 115 Long-Term Care, Medicaid

Waiver Regulations, II and VII.B.6. As part of the reassessment process, the LTCCC reviews the ILA looking at both the health and functional needs of the individual. For initial applications, the LTCCC will meet with the individual and assess ADLs. In fact, B.S., the LTCCC in this case, testified in Fair Hearing No. 20,759 (finding of fact no. 5) and described how she conducts an initial assessment. She visits the applicant for approximately 1.5 hours and has the applicant demonstrate their abilities to do ADLs. During reassessments, the LTCCC may meet with the individual, case manager, or others involved in the individual's care, but there is no requirement to do so. Here, B.S. did not meet with petitioner prior to ruling on petitioner's requests for the 2005-2006 and 2006-2007 service years. B.S. did meet with the petitioner on May 30, 2007, the day before the hearing, but did not do the type of assessment she does for an initial application. Because of the timing of the meeting and its cursory nature, the LTCCC's conclusions from that meeting need to be seriously scrutinized.

Looking first at the unchanged variance requests for dressing and personal hygiene, DAIL has not met its burden of proof.

For the 2005-2006 service year, DAIL granted a variance for dressing of an additional ten minutes per day. DAIL denied the same request one year later. There is no evidence that the petitioner's needs or conditions in respect to dressing changed over the course of the year. Petitioner suffers from torn rotator cuffs in her shoulders and carpal tunnel in both wrists. The original variance for dressing was granted due to recognition that petitioner needed additional time for dressing because she could not put on clothes overhead. The testimony of petitioner, M.S., and M.M. confirm that her condition remains the same and that her needs for assistance remain the same.

For the 2005-2006 service year, DAIL granted a variance of fifteen minutes per day additional time for personal hygiene. The next year, DAIL only granted five minutes per day of the fifteen minute request. Once again, there was no evidence that petitioner needed less time than the prior year to deal with her PCA changing the dressing daily on her ankle sore and applying lotion to her feet nightly to counteract severe dryness. Once again, petitioner and her witnesses corroborated the continuing need.

For the 2005-2006 service year, DAIL found that petitioner met the criteria for variances for both dressing

and personal hygiene. DAIL should be held to that determination in the absence of compelling evidence that petitioner's needs for dressing and personal hygiene had decreased. Accordingly, the variances for dressing in the amount of ten minutes per day additional time and personal hygiene in the amount of fifteen minutes per day additional time should be reinstated.

The decrease in the amount of IADLs from 660 minutes every two weeks to 545 minutes every two weeks is a harder issue. Ordinarily, the IADLs are capped at 330 minutes every two weeks although DAIL can grant variances for particular IADLs. DAIL did so in this case for both shopping and transportation. The decrease in the IADLs does not come from DAIL decreasing their past decisions regarding shopping and transportation. The testimony from B.S. is that she made an error in 2005-2006 in how she counted the variance requests relative to the IADL cap. The information submitted by DAIL for the 2006-2007 service year shows a decrease to other IADLs contributing to the 545 minute figure. Because the evidence was at best confused, this matter was remanded. Based on the evidence and briefing through the remand, the Board incorporates the conclusions as more fully set out in the attached opinion on the Motion to Reconsider and Remand.

B.S. made a calculation error for the 2005-2006 service year. However, the evidence shows that the correct figure was 605 minutes every two weeks. As a result, the IADLs should remain at 605 minutes.

In terms of petitioner's requests for new variances, the burden of proof shifts to the petitioner. The particular requests include mobility, toilet use, and petitioner's renewed request for more time for shopping and transportation. DAIL has the discretion to grant variance requests when the petitioner can show the need for additional time to meet her needs. The issue is whether DAIL abused its discretion in denying these new requests.

DAIL granted ten minutes per day of a twenty minute request for additional mobility assistance to cover range of motion exercises two times per week. DAIL did not give additional time for assistance wheeling petitioner. The record does not reflect that DAIL abused its discretion for this request.

DAIL denied the request for toilet use based on their assessment that petitioner's catheter care is covered under incontinence assistance. Petitioner based her request on her PCA cleaning her catheter and catheter site five to six times per day. The PCA also irrigates petitioner's bladder. The

PCA also makes saline solution to use. Dr. M. R. noted the importance of keeping the catheter and catheter site cleaned to petitioner's health. Petitioner is in danger of recurrent UTIs that could lead to hospitalization. M.M. described how the PCA needs to do the catheter care while petitioner is in bed which is challenging to do. The evidence supports petitioner's contention that she needs the variance request and that DAIL ignored the greater needs she now has subsequent to her bladder surgery. Accordingly, DAIL's decision to deny the variance request for toilet use should be reversed.

Petitioner requested once again that she receive a variance of sixty minutes per day rather than the sixty minutes three times a week granted by DAIL and a variance of 180 minutes for transportation rather than the 160 minutes granted. Once again, the record does not support a reversal of this decision.

This case is complex because of the need to look at all the variance requests—existing and new. Each needs to be looked at separately. The burden of proof differs based on whether the specific ADL or IADL has been terminated or reduced or whether it is a new request. Based on the foregoing, (1) the decision of DAIL to reduce the variance

requests for dressing and personal hygiene is reversed, (2) the decision to partially grant the variance for mobility is affirmed, (3) the decision to deny the variance request for toilet use is reversed, (4) the decision to grant 180 minutes for shopping and 160 minutes for transportation is affirmed, and (5) the IADLs should be set at 605 minutes every two weeks.

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